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NO. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EBENEZER GARCIA-CABAN,
CARMEN MILAGROS ALCINA, etc.,

Petitioners,

v.

UNIVERSITY OF PUERTO RICO,
CAYEY REGIONAL COLLEGE, ETC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether due process is violated by the dismissal of a university professor in a tenure track position, following constitutionally defective procedures, if post deprivation administrative remedies exist which, at least theoretically, provide some remedy.

Whether a post deprivation state remedy is all the due process that the fourteenth amendment requires.

Whether an intentional abuse of state authority can inflict a constitutional injury if a subsequent administrative remedy is available.

Whether a state court can ignore the Federal constitutional claims of a litigant and adjudge a controversy on the basis of state law once a prima facie case has been shown of a deprivation without prior due process of law.

THE PARTIES

Petitioner is Ebenezer García-Cabán, Carmen Milagros Alcina and the legal partnership composed by Ebenezer García-Cabán.

Respondents are University of Puerto Rico, Cayey University College, José Luis Monserrate-Vilá, René A. Hernández, Castora Lozano Berrueso, Pió López-Martínez, Miguel Reckman and José González Barja.

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PETITION FOR WRIT OF CERTIORARI

Ebenezer García-Cabán and Carmen Milagros Alcina petition for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Puerto Rico in this case.

OPINIONS BELOW

On December 22 1987, the Supreme Court of the Commonwealth of Puerto Rico entered an opinion reversing a judgment in favor of your petitioners, Ebenezer García-Caban and Carmen Milagros Alcina, which had been entered by the Superior Court of Puerto Rico on January 3, 1986. Said opinion was the object of a motion for rehearing which was, in turn, denied on January 21, 1988.

The opinion of the Supreme Court of the Commonwealth of Puerto Rico is reported at 87 J.T.S. 124 (December 22, 1987). Certified translations of the opinion of the Court, as well as the dissident opinion and the denial for

rehearing, have been included in the appendix. The Superior Court of the Commonwealth of Puerto Rico entered judgment on January 6, 1986, and a translation is also included.

JURISDICTION

This is a petition for certiorari to the highest court of a "state", based on a federal constitutional and statutory questions -- the applicability of the fourteenth amendment's due process and equal protection clauses, and of 42 U.S.C. Sec. 1983, to the facts of the case. The opinion was entered on December 22, 1987, and the petition for rehearing was denied on January 21, 1988. This petition is filed within ninety days of that order. This Court has jurisdiction under 28 U.S.C. Sec. 1258.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

A. United States Constitution, Fourteenth Amendment

Section 1. Due process of law

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. 42 U.S.C. Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered

to be a statute of the District of Columbia.

C. 42 U.S.C. Sec. 1988. Proceedings in vindication of civil rights attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a

reasonable attorney's fee as part of the costs.

D. Regulations of the University of Puerto Rico

Section 50.3 -- Who shall be granted tenure.

Tenure for faculty shall be granted to those persons with an appointment on probation working full time, filling regular posts in the working budget of the University or in that of any of its institutional units or subunits and, who are judged by the competent authorities to have rendered satisfactory service for a period of five (5) years, all in accordance with the following sections:

Section 50.7 -- Termination of appointments on probation without granting tenure.

The chancellor, in the case of autonomous institutional units, or the president, in the case of the Cayey and Humacao University Colleges, may terminate an appointment on probation without granting tenure, when so justified by the evaluation or evaluations made, by notifying the person concerned in writing.

STATEMENT OF THE CASE

This is a civil rights action to obtain the reinstallment of petitioner to his teaching position at the Cayey campus

of the University of Puerto Rico. Petitioner alleges that he was deprived of said position, through constitutionally defective procedures, for reason of personal, political and ideological prejudice by his evaluators, as well as a serious economic conflict of interest between himself and his evaluators.

A. PETITIONER'S QUALIFICATIONS:

Petitioner, Ebenezer García-Cabán, is a professional educator who commenced his career in 1968, as a secondary school teacher. Following that, and after serving from 1970 to 1972 as an assistant instructor at the Cayey Regional Campus of the University of Puerto Rico, petitioner left his employment in order to study for his Ph.D. Having obtained his degree, "Summa Cum Laude", from the University of Salamanca, in Spain, he then resumed his teaching career at the University of

Puerto Rico's main campus, at the Colegio Universitario del Turabo and at the Interamerican University of Puerto Rico. In 1979, he returned to the University of Puerto Rico, at the Carolina Regional Campus and stayed there for the next four years.

During all this time, all the official evaluations of petitioner's work, both in and out of the teaching room, were excellent.

At the end of four years at said institution, petitioner García-Cabán requested and obtained a transfer to a tenure track position at the Cayey Campus of the University of Puerto Rico. Said transfer was accompanied by a raise in rank and salary and the convalidation of all of petitioner's years of work in Carolina for purposes of the five years probationary period required by the

University of Puerto Rico regulations before teachers can achieve tenure.

Thus, upon his arrival at the Cayey Campus, professor García-Cabán needed only to make it through one more year, in order to achieve tenure within the University of Puerto Rico personnel system.[1]

Yet, at the end of the academic year 1983-84, when he expected to achieve tenure, professor García-Cabán was dismissed for alleged incompetence to perform the duties of his position. Said dismissal is the reason for this action.

B. THE UNDERLYING REASONS:

The truth is that petitioner's transfer to Cayey had not been well accepted by the members of the Personnel

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[1] Section 50.3 of the Regulations of University of Puerto Rico stipulates that tenure shall be granted to persons who adequately performed their duties for five consecutive years, occupying regular teaching positions on a full-time basis.

Committee of the Department where he was expected to work. Professors Miguel Reckman and Castora Lozano, members of the Committee, were both enemies of petitioner, for ideological, political and personal reasons, from ten years before, when petitioner had first taught at the Cayey campus. This persons expressed strong objections to the appointment as soon as they learned of its imminence.

Professor González-Barja, director of the department where petitioner was to work, accepted Reckman's and Lozano's views, on faith, and also expressed his objections to the chancellor.

Furthermore, the presence of petitioner García-Cabán in the Cayey Campus represented an economic menace to all the philosophy professors at the Cayey campus who then being called upon to evaluate his work.

One of the reasons that justified professor García-Cabán's appointment to the Cayey Campus was a shortage of philosophy teachers. As a result, all of the would-be evaluators were teaching one or two extra classes in exchange for additional pay. It was to be petitioner's work to assume those classes which comprised his evaluators' source of additional income.

It must be noted that the amounts involved were in no way insignificant. Each additional section taught represented a twenty five percent increase in income to the members of the evaluating committee. In the case of Miguel Reckman, who taught two additional sections the extra work represented a fifty percent increase to his regular salary.

Thus, it can be seen that the members of the Philosophy Department had every

reason to oppose the appointment of professor García-Cabán, or any other professor, for that matter, to teach philosophy at the Cayey Campus.

In fact, during the trial, the Department Director expressed his opposition to the appointment of a new philosophy professor, alleging that there was no need for said appointment and that rather, a professor of history was what the campus needed.

Under such conditions, petitioner's final evaluation for tenure within the University of Puerto Rico personnel system was performed. Not surprisingly the Department Personnel Committee who visited and evaluated petitioner's class room work, found against him and recommended that his appointment be terminated.

After a perfunctory analysis of the recommendation, the University accepted

the same and terminated petitioner's contract.

C. THE PROCEEDINGS BELOW:

Petitioner then filed an administrative appeal. After nine months of delays, and having been out of work for four months, petitioner filed a civil rights action with the commonwealth court, claiming violations to the due process and equal protection clauses of the Fourteenth Amendments as well as the equivalent clauses in the Commonwealth Constitution.

A hearing was held and a preliminary injunction was issued favoring defendant. During the hearing, the following exchange took place between professor Reckman and the Court on the subject of the class

evaluation performed by the department's personnel committee.[2]

Question: I have some questions for you professor. You, before, to questions by the attorney for plaintiffs, stated that the Committee had been disgusted because the University had appointed plaintiff and that if you had been consulted you'd have told the Committee that it should not be appointed, correct?

Answer: Exactly, yes.

Question: And you said to my questions that you thought, for the reasons that you then stated, that you thought that he was not prepared to teach that class.

Answer: True.

Question: That means that before you made this evaluation you already had your mind made up on the subject of the professor's competence.

Answer: Yes. Because during the year 1972 or 1973 we had already evaluated him. And I think that we have evaluated him twice. Thus, we had our minds made up, yes.

Question: That is, that one way or another, you would have dismissed him.

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[2] It should be remembered that it was precisely said class evaluation which served as a basis for petitioner's dismissal.

Answer: Yes.

Question: With, or without, an evaluation you would have dismissed him?

Answer: Yes.

Professor González-Barja, the philosophy department director, also showed the prejudice existing against petitioner at the time in which his classes were being evaluated. His testimony during the preliminary injunction hearing attests to the truth of this statement. Let us see:

Question: But you had... you told me in the last occasion we spoke, and correct me if I'm wrong, that you had a degree... a bad impression...

Answer: A mental reserve relative to the gentleman.

Question: ... Lot of reserve with respect to the person. And in fact when you were told of the possibility that he might arrive and you discussed it with the Chancellor... Monserrate, I think is his name...

Answer: Yes.

Question: ... you objected his coming...

Answer: Yes.

Question: For two reasons, right? One, because you preferred a historian in the Department and he was not a historian (but) a philosopher, right?

Answer: Ajá. (Affirmative).

Question: And the other one, because of the type of opinion, of image that among some of the people, he had. Correct?

Answer: I had a personal opinion of him. And it was not at all favorable to him. Besides, in the meetings which we comrades had, we spoke about the people. That is a small world and what one does one transmits to the other. Thus, I had an opinion, I believe complete, of him. And that opinion did not favor him at all.

After the injunction was issued a pretrial was held and petitioner requested to amend his complaint to claim, specifically, the relief provided by 42 U.S.C. Section 1983. Said amendments were approved by the court and specifically included in the pretrial order.

The trial, pursuant to the Rules of Civil Procedure, was consolidated with the

preliminary injunction hearing, in order to avoid repetitive testimony.

In the end, the essential findings of facts made during the preliminary injunction hearing were not altered by the evidence presented at trial.

In its Judgment, the trial court concluded that the decision to terminate petitioner had been motivated by personal, political and ideological prejudice and by economic and professional conflicts of interests. It was also determined that substantial violations had been committed with regard to the procedural requirements for class evaluations, established by the Regulations of the University of Puerto Rico. Thus, found the Court, petitioner's equal protection and due process rights had been violated by his dismissal.

The Court then ordered that petitioner be reinstalled in his position, until a

new evaluation of his work was performed. Damages were awarded, but the Court refused to grant attorney fees as required by 42 U.S.C. Section 1988.

Both sides petitioned for certiorari. Petitioners claimed that defendant had already complied with the tenure requirements of the University of Puerto Rico and should not be further evaluated. Petitioners also claimed that the sentencing Court should have granted attorney fees as per 42 U.S.C Sec. 1988.

Respondents requested reversal alleging that the situation did not warrant the Court's intervention and that petitioner should have been ordered to exhaust the administrative remedies available. They also alleged that, since no tenure had been granted at the time of the defective evaluation, petitioner

lacked a proprietary interest and could be fired at will.

To this, petitioner countered that there existed "rules and understandings, promulgated and fostered by state officials that may justify his legitimate claim of entitlement to continued employment absent sufficient cause".[3] Specifically, argued petitioners, Rules 50.3 and 50.7 of the Regulations of the University of Puerto Rico,[4] justified petitioner's claim of entitlement. And once the entitlement is granted it cannot be taken away except through constitutionally valid procedures.[5]

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[3] Perry v. Sinderman, 92 S.Ct. 2694 (1972)

[4] Said rules are copied, verbatim, on pages 5 and 6 of this petition.

[5] Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)

On December 22, 1987, the Supreme Court of the Commonwealth of Puerto Rico Granted respondent's request and reversed the Judgment of the Superior Court.

The Court found that, having the University of Puerto Rico created an administrative system for handling such claims as petitioner's, there was no need for the courts to intervene.

The Court withheld judgment on the issue of whether petitioner could be fired at will because the question became moot, in view of the ruling returning the matter to the administrative forum. Nevertheless, the Court issued a strongly worded dictum which makes it clear that had the Court been forced to resolve the matter it would have ruled in favor of petitioner.

The question of attorney fees was mooted by the reversal and thus the Court did not discuss the subject.

REASONS FOR GRANTING THE WRIT

A. THE ENTITLEMENT:

It is well settled Commonwealth law that once an administrative agency issues regulations that limit its discretion, it becomes obliged to follow strictly said regulations, and it can no longer decide freely whether to recognize or not the rights and entitlements that it has granted its employees. Díaz de Llovet v. Gobernador, 112 D.P.R. 747, 757 (1982); García v. Adm. del Derecho al Trabajo, 108 D.P.R. 53 (1978).

The University of Puerto Rico issued regulations, and said regulations determine who shall be granted tenure and

who can be dismissed without tenure.[6] A professor who occupies a regular position, on a full time basis, on probationary status, is on a tenure track position. If he performs his duties, for a period of five years, to the satisfaction of the pertinent authorities, he shall be granted

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[6] Section 50.3 -- Who shall be granted tenure.

Tenure for faculty shall be granted to those persons with an appointment on probation working full time, filling regular posts in the working budget of the University or in that of any of its institutional units or subunits and, who are judged by the competent authorities to have rendered satisfactory service for a period of five (5) years, all in accordance with the following sections:

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tenure. There is no choice there. Thus, we must conclude it is an entitlement.

But the entitlement described does not accrue until the five years of satisfactory services have gone by, which leaves us to wonder what would be the extent of protection, if any, enjoyed by professors in tenure track.

Rule 50.7 provides the answer. The dismissal of a teacher on tenure track can only be carried out "when so justified by the evaluation or evaluations made". Therefore, a professor in tenure track will continue sailing merrily on until such time as valid evaluations justify a different course of action. In the absence of negative evaluations, the professor in tenure track is <u>entitled</u> to continue in his position until he achieves tenure. It can then be said that the difference between tenure and tenure

track is one of degrees -- in essence, the non-tenured professor must submit to periodic evaluations and, the risk they entail, when so required by the pertinent authorities. The tenured professor need not do so.

But it is not the non-tenured professor's duty to assure that he is properly evaluated. That is the authorities business, and it must be assumed that, so long as he is not dismissed, he is performing adequately. To conclude otherwise would mean that the authorities could deprive a professor of his right to tenure simply by refusing to evaluate him.

Petitioner, at the time of his dismissal, had the equivalent of four years in tenure track and needed to submit only to one final evaluation. We respectfully submit that he was entitled

to tenure at the end of the year, absent a valid evaluation justifying a different result.

B. THE PROCESS DUE:

The University of Puerto Rico did not have to grant its non-tenured employees the rights contained in rules 50.3 and 50.7. But once the rights were granted, they could not be taken away except after constitutionally adequate procedures. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). And if there is agreement as to a requirement for an adequate procedure, it is that the persons who will serve as judge be neutral. Professor Tribe probably has said it best:

> The Supreme Court has traditionally placed enormous weight on securing the **neutrality** of due process hearings. In this area, indeed, the Court's approach to due process has tended to stress its **intrinsic** aspects as much as its **instrumental** aspects, focusing

on the "moral authority" of the law as well as on the accuracy of its application. Thus "the right to an impartial decision-maker is required by due process" in every case. And since "the appearance of evenhanded justice . . . is at the core of due process," the Court will disqualify even decision-makers who in fact "have no actual bias" if they might reasonably **appear** to be biased.

The Court's examination of the demand for impartiality has been structured by a distinction between personal and institutional conflicts of interest. In the realm of personal conflicts, the Court has consistently held that procedural due process bars ostensibly impartial decision-makers from deciding cases whose outcome directly and substantially affects their personal financial interests or the financial concerns of organizations for which they are officially responsible. Nor way a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a decision. Tribe, L., American Constitutional Law, Section 10-16, pp 744-745, The Foundation Press, Inc. (1988) (Emphasis in the original) (Citing Arnett v. Kennedy, 416 US 134, 197 (1974) (White, J., concurring in part and dissenting in part); Mayberry v. Pennsylvania, 400 US 455, 469 (1971) (Harlan, J., concurring); Morrissey v. Brewer, 408 US 471, 485-86 (1972) (decision-marker bias is grounds for

reversal); Goldberg v. Kelly, 397 US 254, 271 (1970) (same); Tumey v. Ohio, 273 US 510 (1927); Gibson v. Berryhill, 411 US 564 (1973); Aetna Life Ins. Co. v. Lavoie, 106 S.Ct. 1580 (1986); Ward v. Monroeville, 409 US 57, 60 (1972); Offutt v. United States, 348 US 11, 14 (1954)).

Clearly the evaluation which served as a basis for petitioner's dismissal does not conform to the standards above expressed and, notwithstanding what the Commonwealth's Supreme Court majority might have said, it was constitutionally defective.

C. THE REMEDY:

Since the opinion in Goldberg v. Kelly [7] was handed down in 1970, it has been generally recognized that interests founded only in state-fostered expectations can qualify as entitlements for the purpose of due process protections. And let has also been held

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7 397 US 254 (1970).

that the revocation of licenses which may become essential in the pursuit of a livelihood have to be preceded by a "due process" hearing. Bell v. Burson, 402 US 535 (1971).

And in Fuentes v. Shevin [8] it was held that even a possessory interest protected by contract was sufficient to invoke the protection of the due process clause against the rights of unquestioned owner of the property. And in order for the owner of the goods to ease the goods prior to final judgment, a fair prior hearing was held to be necessary.

The requirement of a prior hearing before a deprivation, though, has suffered some erosion in the recent opinions of this Court. See Ingraham v. Wright, 430 US 651 (1977); Parratt v. Taylor, 451 US

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[8] 407 US 67 (1972).

527 (1981) and Hudson v. Palmer, 468 US 517 (1984).

It has been suggested that this cases together mean that even an intentional abuse of state authority cannot inflict constitutional injury, so long as a post deprivation remedy is available at the state level. Although this theory has traditionally been valid for exceptional types of deprivation, like imminent domain, its extension to other areas of the law can, for all practical purposes emasculate the due process clause and 42 USC Sec. 1983. Thus any state could pass a law providing post deprivation remedy for all kinds of violations and prevent victims from claiming their constitutional rights.

When it ruled as it did, the Commonwealth's Supreme Court has, in fact, extended to tenure cases the rationale of

Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 51 (1984) -- so long as a post deprivation remedy exists at the state level, there would be no lack of due process. Hence, no constitutional tort would take place and there is no triggering of 42 U.S.C. Sec. 1983.

Nor would the doctrine of Patsy v. Board of Regents,[9] apply since the administrative remedies would cancel the violations of federal constitutional rights.

In our case, the reason underlying said ruling is a great deference for the University authorities and a great value placed on the convenience of allowing these matters to be "delegalized" in the informal proceedings of the University.

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9 102 S.Ct. 2557 (1982)

Said vision, though, "stands in some tension not only with social reality, but also with the theoretical underpinnings of a Constitution that assumes individuals require legal protection from the overreaching power of the state. Too often, the ideal of the delegalized society is a mask for a society in which one of the few tools available to combat official subjugation is taken away from potential victims of such oppression.".[10]

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[10] Tribe, L., American Constitutional Law, 2nd Ed., p. 676.

CONCLUSION

A limit must be placed to the tendency described above and we respectfully submit that the facts of this case are a good and adequate vehicle for the Court to restate the limits of said doctrine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Luis A. González Pérez, a member of the Bar of the Supreme Court of the United States and cousel of record for Ebenezer García Cabán, Carmen Milagros Alcina and the legal partnership composed by Ebenezer García Cabáan and Carmen Milagros Alcina, petitioners herein, hereby certify that on April 20, 1988, pursuant to Rule 33, Rules of the Supreme Court, I serve three copies of the Petition For Writ of Certiorari on each of the parties herein, as follows:

On University of Puerto Rico, Cayey University College, José Luis Monserrate-Vilá, René A. Hernández, Castora Lozano Berrueso, Pió López-Martínez, Miguel Reckman and José González Barja, respondents, by depositing such copies in the United States Post Office, San Juan, Puerto Rico, with first class postage

prepaid, properly addressed to the post office address of Ledesma, Palou & Miranda, the above-named respondents counsel of record, Suite 1103, Banco de Ponce Building, Hato Rey, PR 00918.

All parties required to be served have been served.

I FURTHER CERTIFY that on April 20, 1988, I personally supervised the filing of the instant petition for Writ of Certiorari by deposit in the U.S. Post Office, via Express Mail, and properly addressed to the Clerk of the Supreme Court of the United States.

In San Juan, Puerto Rico, this 20th day of April, 1988.

Luis A. González-Pérez
P.O. Box 1026
Hato Rey, PR 0919
(809) 753-1100

Affidavit No. 2082

Sworn and suscribed to before me by Luis A. González Pérez, of legal age, married, an Attorney and resident of San Juan, Puerto Rico, personally known to me this 20th day of April, 1988.

NOTARY PUBLIC

SEGUNDO GARCIA CABAN
ABOGADO
NOTARIO
ISLA DE PUERTO RICO

CERTIFIED TRANSLATION:

IN THE SUPREME COURT OF PUERTO RICO

No. RE-86-121 Review

Ref. RE-86-217

Ebenezer García-Cabán,

Carmen Milagros Alcina, etc.,

Plaintiffs-Appellees

vs.

University of Puerto Rico,

Cayey Regional College, etc.,

Defendants-Appellants

Court's Opinion, issued by ASSOCIATE JUSTICE MISTER HERNANDEZ-DENTON

San Juan, Puerto Rico, 21 January 1988.

We revoke the judgment of the Superior Court, San Juan Section, which granted a complaint for permanent

injunction and damages and ordered the reinstatement of plaintiff Ebenezer García-Cabán to a probationary position of assistant professor under contract in the Cayey University College. The University of Puerto Rico raises before us that the doctrines of primary jurisdiction and exhaustion of administrative remedies barred plaintiff from resorting to the judicial forum in the first instance. We resolve that the circumstances in this case do not show that there was a need to utilize the extraordinary recourse of injunction and thus bypass the ordained administrative route.

I

The University of Puerto Rico, like all institutions of higher learning, periodically evaluates its teaching personnel in order to verify their performance and qualifications to

continue to hold a teaching position, to consider possible promotions in academic rank and the granting of tenure.

The standards, criteria and procedures to make such evaluations are those established by the General Bylaws of the University of Puerto Rico and the President of the University.(1) By regulatory provision the direct evaluation is performed by the promotions and tenure committees in accordance with each faculty's standards.(2)

The evaluation process of non-tenured teaching personnel in the Cayey University College contemplates: 1) a visit to

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(1) Sec. 49.1, General Bylaws of the University of Puerto Rico, April 1st., 1981.

(2) Said standards must be consonant with the General Bylaws of the University. Sec. 49.2, General Bylaws.

the classroom by the Department's Personnel Committee, composed of three professors elected by the members of said department; 2) a visit to the classroom under the charge of the department director; and 3) an evaluation by the students in accordance with a form prepared for those effects.(3)

During the classroom visit made by the Personnel Committee, its members prepare an evaluation. Afterwards, the Committee meets and a joint evaluation sheet is completed wherein the score given by each evaluator to the professor and the evaluation of the full committee

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(3) Said procedure complements the teaching personnel evaluation standards and ranks as a regulation in accordance with the provisions of Sec. 14.11 of the General Bylaws of the University.

are summarized. The committee's evaluation, the department director's and the students' evaluations then go to the Institutional Personnel Committee, composed of representatives of all the academic departments of the Cayey University College. Although the direct evaluation of teaching personnel is done by the Personnel and the Teaching Staff Committees, the decision to terminate a probationary appointment belongs to the Chancellor in this case.(4)

As a general rule, for the purpose of a recommendation to the Chancellor on the retention or non-retention of a non-tenured professor, the Institutional Committee considers decisive a score of

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(4) Sec. 50.7, General Bylaws. Apparently, the Cayey University College became an autonomous unit of the University of Puerto Rico after the General Bylaws were adopted.

220 in the evaluation of a professor. If the evaluation of two of the three bodies amounts to 220 points or more, retention of the employee is recommended in principle. If two of the three evaluating bodies grant the professor a score under 220 points, retention of the employee is generally not recommended.

During the year 1983-84 García-Cabán worked as Assistant Professor of Humanities in the Cayey University College, through a probationary contract. He was evaluated in the first semester of the academic year by the Personnel Committee of the Department of Humanities, by the Director of the Department of Humanities and by his students. The result of such evaluations was the following: the Director considered the professor's teaching work as "fair" (206 points), the Personnel Committee considered it "deficient"

(122 points), and the students considered it "good" (323 points). Pursuant to these results, it was recommended that a new teaching contract not be granted to the plaintiff.

Not satisfied with the evaluations he received, García-Cabán appealed before the Institution's Personnel Committee. The evaluations of his teaching work were brought before it. The case was assigned for further evaluation to Dr. René Hernández-Toledo, thevery Chairman of the Institutional Committee, who after completing his analysis of the case did not find any merits in the appellant's pleadings. He so informed the Institutional Committee. After said Committee in full considered professor García's case, it proceeded to vote unanimously, with one abstention, a recommendation that he not be retained as a member of

the Institution's teaching personnel.

This recommendation then went before the consideration of the Chancellor of the Cayey University College. The Chancellor ordered another evaluation of the case which did not produce favorable results for the plaintiff either. Said process being concluded, Chancellor José Luis Monserrate decided not to grant a new probationary contract to the professor.

On 18 January 1986 /sic/ García-Cabán appealed the Chancellor's decision before the President of the University. On 23 January 1984 the examining officer appointed by the President granted plaintiff fifteen (15) days to submit his memorandum of authorities in support of the appeal. On the same date the professor voluntarily dismissed the appeal filed, but reinitiated the same on 14 February.

On 7 March 1984 the President remanded the case to the Cayey University College with instructions that García-Cabán be granted a hearing. A new examining officer was appointed. The latter summoned the parties for a preliminary meeting on 18 June and the hearing was set for 27 August 1984. After the hearing was suspended on two occasions at the professor's request, on the 1st. of October 1984 the later filed the complaint on injunction that originates this recourse.

The cause of action was based on Law No. 12 of 8 August 1974 (32 L.P.R.A. Sec. 3524), also known as "The Civil Rights Act." In synthesis, discrimination for "financial interest and political and ideological motives" was alleged. The University was sued as well as several officials in their personal capacity.

After a hearing on the preliminary injunction, the trial court ruled that García-Cabán did not have to exhaust administrative remedies considering that said recourse constituted a useless and ineffective effort. It concluded that in the evaluations that were made of him all of the established criteria were not followed and that the Department's Committee acted with the motivation of personalisms and philosophical and ideological prejudices. Therefore, it granted the petition for unjunction and ordered the university authorities to reinstate the plaintiff to his position until he was again subjected to evaluation wherein the former evaluators must not participate. Subsequently, on 3 January 1986 the court a quo ratified itself when it issued a permanent injunction with the same provisions.

Both the University and the professor appealed this judgment and order. The latter complains that the court did not reinstate him to his position permanently. The University asks us to revoke the judgment which is the subject of this recourse because it constitutes a judicial intervention in violation of the principles of academic freedom and in preterition of the doctrines of primary jurisdiction and exhaustion of administrative remedies. It likewise argues that since García-Cabán is a probationary public employee he does not have a proprietary right to the retention of his employment and may therefore be separated from his position at the discretion of the appointing authority.

In attention to the ratio of the opinion we hereby issue, it is not necessary, as good adjudicating technique, for

us to make a pronouncement on this last matter. However, an analysis of the pertinent statutory and regulatory norms shows that the intention of the lawmaker was clearly to delegate to the University of Puerto Rico ample powers on the subject of the rights and duties of its employees. 18 L.P.R.A. Secs. 602 (5) and (12). In this case, the University, in compliance with the mandate of the Legislative Assembly, established General Bylaws which delineate the scope of its powers in the areas of selection, evaluation, retention and promotion of its teaching personnel. In the presence of adequate legal and regulatory safeguards that reduce the possibility of arbitrariness and facilitate our judicial review, Torres Arzola v. Puerto Rico Police, 118 D.P.R. ____, (Opinion of 11 April 1986), no further pronouncement on the issue of

due process of law is necessary. We reiterate, as a rule of administrative law, that once the agency was published regulations to facilitate its decision-making process and to limit the scope of its discretion, it is bound to observe them strictly and it is not up to its sovereign will to recognize or not the rights that it has itself accorded to its employees. Díaz de Llovet v. Governor, 112 D.P.R. 747, 757 (1982); Hernández García v. L.R.B., 94 D.P.R. 22, 29 (1967). See Branywine /sic/ AFF. NCCEA/ DSEA v. Brandywine BD. of Ed., 555 F. Supp. 852, 863-864 (1983).

The University acknowledges and accepts the premise that its discretion -regardless of the nature of the law involved- must be exercised in accordance with constitutional criteria. If the decision not to renew García-Cabán's

contract was motivated by unconstitutional criteria, the same can not be sustained. In other words, the professor is entitled not to be denied a permanent position at the University because of discrimination forbidden by the Constitution or the applicable laws. Bill of Rights of the Constitution of the Commonwealth, Art. II, Sec. I; Báez Cancel v. Mayor, 100 D.P.R. 982 (1972).

The professor, on his part, in no manner whatsoever refutes the fact that pursuant to Art. 14, Sec. 14.10 of the General Bylaws the President of the University was authorized to prepare and submit to the Council on Higher Education for its approval, a series of regulations among which is the "Regulation on Appeal Procedures for the University System." Said Regulation was approved on 14 May 1982 and is extensive to all administra-

tive appeals interposed in the University System, to include appeals to the Chancellors, the President of the University, the University Board and the Council on Higher Education.(5)

Section 6 of the Regulation sets forth the procedure for appeals, indicating the manner to initiate it; the documents that may be required (6.5); on the preliminary and summary disposition of the recourse (6.6); on the appointment of examining officers (6.7); on the holding of administrative hearings (6.10, 6.11); on the presentation of evidence (6.15); to submit memorandums (6.16); on the preservation of the record of the hearings (6.17); reconsiderations (6.19);

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(5) By legal mandate, it pertains to the Council on (Higher) Education to resolve the appeals interposed against decisions of the President or the University Board.

temporary remedies (6.20) and other provisions of a procedural nature. The remedies provided are energetic and efficient. It is provided that the appellate authority may revoke, confirm or modify the appealed ruling or decision, as well as annul, confirm or modify any subsequent action. To those effects said body will issue a resolution with findings of fact and of law and, in addition, the following information: official or body before which an appeal or a petition for review may be filed; time limits wherein to petition for the same; and time limits to petition for reconsideration. In summary, the Regulation covers a vast range of matters.

In these circumstances, the main controversy in this case is whether the facts justify that we do without the

general rules of primary jurisdiction and exhaustion of administrative remedies. In other words, to evaluate whether judicial review is proper at this stage we must first analyze whether professor García-Cabán's claim is so urgent or intense that it deserves bypassing the administrative route.

II

Our jurisprudence's answer to the problem of distribution of functions among administrative organisms and the courts is complex. The decision of requiring or not the exhaustion of administrative remedies does not depend on rigid criteria, but instead, on whether in the light of the circumstances of the case and the agency's particular expertise it is understood that judicial intervention would be premature. Vélez Ramírez v. Romero Barceló, 112 D.P.R.

716, 722-723 (1982). In Vélez Ramírez, id., we stated on page 722:

> Both the doctrine of exhaustion and the one of primary jurisdiction fulfill the goal of maintaining an adequate balance and distribution of power and tasks between the administrative agencies and the judicial power. Febres v. Feijoó, 106 D.P.R. 676 (1978). The doctrine of primary jurisdiction attempts to determine whether the initial intervention in a controversy belongs with an agency or a court. On the other hand, the exhaustion (doctrine) is geared to deciding when is the appropriate moment for the courts to intervene in a controversy previously submitted to an administrative intervention. Therefore, the analysis of its possible application arises when, after proceedings or action have been initiated in an administrative agency, judicial intervention is requested to review decisions or to obtain a judicial remedy before the entire established administrative processes or proceedings have been completed. Quiñones v. A.C.A.A., 102 D.P.R. 746 (1974), and Commonwealth v. 12,974.74 Square Meters, 90 D.P.R. 506 (1964). (Original emphasis).

Although reivindication of constitutional rights belongs to and can be claimed in the first instance in the courts of justice without the administrative forum having any original jurisdiction thereon, Pierson Muller I. v. Feijoó, 106 D.P.R. 838, 852 (1978), in Febres v. Feijoó, 106 D.P.R. 676, 681 (1978), we held that "when evaluating the recourse before the courts of justice against the acts of administrative bodies or officials in cases wherein the statute provides for an appeal within the administrative channels, a distinction must be made between matters of statutory interpretations wherein the courts are specialists and matters proper for administrative expertise."

In our jurisdiction, claims for violations of civil rights under Law No. 12 of 8 August 1974 (32 L.P.R.A. Sec.

3524) have at all times been evaluated in the light of whether the action involves or not an injury of patent intensity to the individual's right. We have always tended to preserve the exceptional nature of the proceedings and to restrict it to verifying urgent situations. The recourse of injunction to prevent that a person be deprived of a right or privilege protected by the Constitution or the laws of the Commonwealth of Puerto Rico or the Laws of the United States of America has neither displaced nor replaced the procedure for appeals and reviews of rulings made in the administrative sphere. First Fed. Savs. v. Assoc. of Co-owners, 114 D.P.R. 426, 437-438 (1983); Santiago v. Superintendent of Police, 112 D.P.R. 205 (1982); Pierson Muller I. v. Feijoó, 106 D.P.R. 838, 850-851 (1978); Otero Martínez v.

Governor, 106 D.P.R. 552 (1977).

The issue is presented here with special intensity. Intervention by the courts with the decisions of the universities and other education centers in matters of retention and promotion of their teaching personnel gives rise to classic and delicate problems of academic freedom and autonomy of the university. The Academy in the Courts: A Symposium on Academic Freedom, 16 U.C. Davis L. Rev. 831 et seq. (1983).

It has been traditionally recognized that it pertains to the universities to establish academic competence criteria for their teaching personnel. This matter is generally the object of extensive internal regulation and evaluation by professors with specialized knowledge and vast experience. The state's university needs to accomplish its educational

mission free from external pressures. However, that commitment must be exercised prudently and in such a manner that the fundamental rights of its personnel are not impaired.

Having examined the duties, attributes, prerogatives and functions assigned to the University of Puerto Rico and the manner in which its services are perforemd and rendered, perhaps there is no other instrumentality or public corporation in greater need of a reaffirmation of its autonomy than this institution. Statement of Motives, Art. 1 of Law No. 1 of 20 January 1986. Specifically in matters of selection and promotion of its teaching personnel, the deference of the courts is an indispensable condition for its very existence. Now, whereas the Council on Higher Education is a sui generis body with vast powers to regulate

college level education in this country, this does not mean that the courts must assume indifferent or impassive attitudes when judicially reviewing its decisions, nor that we have a residual competence in matters previously submitted to the regulatory or adjudicating power of our main house of learning. Likewise, the recourse of injunction shall be the precise remedy to protect rights and immunities of a constitutional or statutory nature.

We make reference today to our earlier statements. "Precisely, for our civil safeguards not to be eroded, illustrated, acute and constant criticism by those groups dedicated to the highest study is indispensable. To quiet their grievances may jeopardize those liberties that were so difficultly consecrated in a not too distant past. It was thus recognized by the Puerto Rican lawmaker

when he provided that, for the accomplishment of its mission, the University of Puerto Rico 'should keep in mind that because of its nature as a University and because of its identification with the lifestyle ideals of Puerto Rico, it is essentially linked to the values and interests of the entire democratic community.' 18 L.P.R.A. Sec. 601, subparagraph (b)(6)." Sánchez Carambot v. Dir. Humacao Univ. Col., 113 D.P.R. 153, 161 (1982).

We rule, however, that in the absence of violations to constitutional rights, in the areas of selection and promotion of teaching personnel the courts must intervene in the review of the acts of educational organisms only when the same are arbitrary or lack a rational basis. This function must be performed cautiously, particularly when through a

regulation the academic institution has established a decisionmaking process with ample guarantees that the affected person will have an opportunity to be heard. As we said earlier, we judges do not have the information nor the required expertise in this field. Decisions in matters such as the instant one usually require the exercise of the personal judgment, the academic deliberation and the deep knowledge both of the candidate and of the university institution. Board of Curators v. Horowitz, 435 U.S. 78, 87, 91 (1978); Lovelace v. Southeastern Massachussets University, 793 F.2d 419 (1st Cir. 1985); Kelleher v. Flawn, 761 F.2d 1079, 1084 (5th Cir. 1985); Siu v. Johnson, 748 F.2d 238 (4th Cir. 1984); Clark v. Whiting, 607 F.2d 634, (4th Cir. 1979); Huang v. College of the Holy Cross, 436 F.Supp. 639, 653 (1977);

Cussler v. University of Md., 430 F.Supp. 602, 605-606 (1977); Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973). Also see Regents of the University of Michigan v. Scott E. Ewing, 88 L.Ed. 2d 523 (1985). For these reasons, the selection of the judicial forum by professors whose claim must be properly resolved in the administrative channels before the university structures is a practice that requires an "indispensable degree of authenticity and clarity when claiming constitutional issues pursuant to the Civil Rights Act..." Pierson Muller f. v. Feijoó, supra, page 853.

With these criteria in mind, we must decide whether the balance of interests in this case justifies that the administrative remedies before the university bodies in charge of making a final decision on the pleadings of professor

García must be exhausted or whether, in the light of the evidence offered, the formulated claim adduces clear and precise facts that justify the option through the constitutional remedy and the preterition of the administrative channel.(6)

A reading in depth of the transcript of the evidence in the case file as well as of the judgment of the Superior Court shows that, at most, professor García-Cabán possesses an educational philosophy different from that of his evaluators.(7) Discrepancies among members of an academic community as to the best manner

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(6) Plaintiff's entire testimony during the preliminary injunction hearing was transcribed and said transcript is in the case file.

(7) Petitioner /sic/ believes in the "pragmatic" thought, a current which is rejected by several of his colleagues.

in which a subject should be taught is an integral part of the differences that normally occur at universities. Hetrick v. Martin, supra, 705, 708-709. There was proof that some of the evaluators had preconceived notions about the teaching abilities of professor García since they knew his prior performance at the Cayey University College. However, philosophical conflicts between evaluators and persons being evaluated do not justify our intervention in the absence of a concrete show of facts whereon we may ground an inference that the decision of not to renew the professor's contract was motivated by unconstitutional grounds or in the deprivation of his civil rights. The evidence presented by professor García does not even remptely comply with the outlined criteria. In those circumstances the premature intervention

of the courts is not justified.

The professor can obtain a remedy within the same university appellate structures -the President and the Council on Higher Education- or in the process of judicial review of administrative decisions. "After all, the rule of preferring exhaustion of administrative action is a convenience compatible with justice which does not eliminate final scrutiny by the courts." Vélez Ramírez v. Romero Barceló, supra, page 727.

While there is an absence of a clear issue of discrimination, there is also no evidence to support the ruling of the primary forum in the sense that to proceed with the administrative efforts in the instant case constitutes a useless or ineffective action.

There is no doubt that the swiftness of administrative justice is a condition

of its efficacy. However, from the record of the case it arises that the administrative process was not delayed because of reasons attributable to the University and that to a great extent the delays that occurred were due to the appellant /sic/ himself. For example, on one occasion he voluntarily dismissed the action filed and on another he requested a postponement of the hearing set.

In summary, it is proper in this case for the university structures to review the evaluation process followed with Professor García-Cabán and to determine whether the regulatory standards in force and the competence criteria of that educational center were complied with.

Although the University Bylaws provide that an appeal does not have a suspense effect, "except when the

reviewing authority determines otherwise,"[8] the pertinent appeals body must consider -in the fine balance of conveniences and damages- the possibility of granting the appellant a provisional remedy within the administrative proceedings so that he may remain in his employment until all of the pertinent authorities issue a final ruling in the matter.

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(8) Section 50.8.3 - Right to petition for review

Once the termination of the probationary appointment without the granting of permanence is notified, within the thirty (30) days following the date of the notice, the affected person may petition for the review of his/her case through the appropriate channels. Except when the reviewing authority otherwise determines, the action terminating the appointment will continue in force while the review is processed.

Also see Section 6.20 of the Regulation on Administrative Appellate Procedures.

For the foregoing reasons the judgment of the Superior Court is revoked and the case is remanded to the University of Puerto Rico for the continuation, should the petitioner so request, of the internal appellate procedure.

/S/ Federico Hernández

FEDERICO HERNANDEZ-DENTON

Associate Justice

San Juan, Puerto Rico, April 18, 1988.

CERTIFIED to be a correct translation prepared by

/S/ Ernesto Quidgley

ERNESTO QUIDGLEY

U.S. Certified

Court Interpreter

(PL 95-539, 28 USC 1827)

CERTIFIED TRANSLATION:

IN THE SUPREME COURT OF PUERTO RICO

No. RE-86-121 Review

Ebenezer García-Cabán,

Carmen M. Alcina, etc.,

Plaintiffs-Appellees

vs.

University of Puerto Rico,

Cayey Regional College, etc.,

Defendants-Appellants

RESOLUTION

San Juan, Puerto Rico, 21 January 1988.

The foregoing motion for reconsideration is denied.

It was so agreed by the Court and the General Clerk so certifies. Associate Justice Mr. Negrón-García would reconsider. Associate Justice Mr. Ortiz disqualified himself.

/S/ Bruno Cortés Trigo
Bruno Cortés-Trigo
General Clerk

San Juan, Puerto Rico, April 18, 1988.

CERTIFIED to be a correct translation
prepared by

/S/ Ernesto Quidgley
ERNESTO QUIDGLEY
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(PL 95-539, 28 USC 1827)